In short, the tribes' right to sue has resulted in negotiated settlements that have done justice (or at least come closer to doing justice) for all concerned parties. The Second Circuit's decision threatens to disrupt this mechanism for accommodating all relevant interests, rewarding New York's intransigence, and leaving the tribes with nothing – not a remedy or even a justiciable claim for the plain violations of the Non-Intercourse Act at issue here.[5] Nothing in this Court's decisions, in congressional statutes, or in any sensible articulation of federal Indian policy permits that result.

CONCLUSION

This Court, not a sharply divided panel of the Second Circuit, should finally decide if the Indian land claims it has considered in three separate cases over the past thirty years are no longer viable claims. The Second Circuit erred in interpreting this Court's decision in *Sherrill* as an instruction to foreclose all relief – even monetary relief – for Indian land claims based on the fact that they are, at bottom, disruptive, and as disruptive claims, subject to the

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Catawba Indian Tribe of South Carolina Settlement Act, 25 U.S.C. §§ 941-941n.

[4] *See Oneida Indian Nation v. New York*, 691 F.2d 1070, 1083 (2d Cir. 1982): "[E]very major Indian land claim to date has been settled with the United States and states, not private parties, providing the settlement funds."

[5] On July 1, 2005, the Times Union also reported on the comments of Joseph Bruno, New York State Senator and Republican Majority Leader: "[Bruno] believes all pending claims are dead as a result of the Cayuga cases decision. Now, he said, the governor should drop land claims settlements talks. . . ."

equitable doctrine of laches. The prospect of disrupting the *status quo* has never been a basis for leaving an Indian tribe with absolutely no remedy for the vindication of its treaty-secured rights. This Court has recognized that monetary relief can and should be available when the alternative remedy is disruptive. Based on the foregoing, this Court should grant review to provide clear guidance on this question of exceptional importance.

Date: April 7, 2006

Respectfully submitted,

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(4)

Nos. 05-982 and 05-978

In The Supreme Court of the United States

CAYUGA INDIAN NATION OF NEW YORK, *et al.*,

Petitioners,

v.

GEORGE E. PATAKI, GOVERNOR OF THE STATE OF NEW YORK, *et al.*,

Respondents.

UNITED STATES,

Petitioner,

v.

GEORGE E. PATAKI, GOVERNOR OF THE STATE OF NEW YORK, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF *AMICUS CURIAE* ONONDAGA NATION, TONAWANDA BAND OF SENECA INDIANS, MOHAWK NATION COUNCIL OF CHIEFS AND THE HAUDENOSAUNEE IN SUPPORT OF THE PETITIONS FOR WRIT OF CERTIORARI

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INTEREST OF *AMICI*

Amici Onondaga Nation, Tonawanda Band of Seneca Indians, Mohawk Nation Council of Chiefs and the Haudenosaunee submit this brief in support of the petitions for certiorari filed by the Cayuga Indian Nation of New York and the Seneca-Cayuga Tribe of Oklahoma in No. 05-982 and the United States in 05-978.[1] *Amici* are plaintiffs in land rights cases in New York that may be affected by the court of appeals' decision below.[2] The Onondaga Nation and Tonawanda Band of Seneca Indians are recognized by the United States. 70 Fed. Reg. 71194 (2005). The Mohawk Nation Council of Chiefs is a traditional Indian government with authority over its members at Akwesasne in northern New York (also known as the St. Regis Mohawk Reservation) and a co-plaintiff with two other Mohawk governments and the United States in the Mohawks' pending land claim. The Haudenosaunee, or Six Nations Confederacy, is a signatory to the Treaty of Fort Stanwix of 1784 and the Treaty of Canandaigua of 1794, which define the relationships between Indian nations in New York and the United States. The Onondaga Nation, Tonawanda Band of Seneca Indians and the Mohawk Nation are member nations of the Haudenosaunee. As claimants to lands obtained by the State of New York in

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[1] Counsel for *amici* authored this brief in whole, and no person or entity other than *amici* made a monetary contribution to the preparation or submission of this brief.

[2] *Onondaga Nation v. State of New York, et al.*, Civ. No. 05-CV-314 (LEK/DRH) (N.D. N.Y., filed March 3, 2005); *Seneca Nation of Indians and Tonawanda Band of Seneca Indians v. State of New York, et al.*, 382 F.3d 245 (2d Cir. 2004), *petition for certiorari filed*, 6 U.S.L.W. 22 (U.S. Feb. 3, 2006) (No. 05-905); *Canadian St. Regis Band of Indians, et al. v. State of New York, et al.*, 278 F. Supp. 2d 313 (N.D. N.Y. 2003).

violation of the Trade and Intercourse Act, *amici* have a substantial interest in the issues raised by the court of appeals' decision and this Court's consideration of the petitions for certiorari. Respondents State of New York, et al. in both No. 05-982 and No. 05-978 have consented to the filing of this brief. Petitioner United States in No. 05-978 has consented to the filing of this brief. Petitioners Cayuga Indian Nation of New York and Seneca-Cayuga Tribe of Oklahoma in 05-982 have consented to the filing of this brief.

SUMMARY OF ARGUMENT

Review is warranted because the court of appeals' decision conflicts with this Court's rule that laches cannot be invoked by a party guilty of bad faith. New York State's bad faith with regard to the Cayugas consists of the State's knowing violation of the Trade and Intercourse Acts, its enormous financial profits from obtaining Cayuga land at a fraction of its value, and its steadfast resistence to justice for the Cayugas. Review is also warranted because the court of appeals' decision conflicts with this Court's rule that the passage of time should not be considered unreasonable for purposes of laches when the party against whom it is invoked did not have an adequate opportunity to assert its rights or was under a disability that effectively prevented such lawsuits. Here, Indian nations in New York, including the Cayugas, lacked legal capacity to file suit unless authorized by statute. This rule was not changed until relatively recently. Also, the federal and state courts were effectively closed to the Cayugas for more than 184 years, due to various jurisdictional and practical barriers. The court of appeals failed to take these

circumstances into account, as this Court's precedents require. The petitions should therefore be granted.

REASONS FOR GRANTING THE PETITIONS

The court of appeals' decision dramatically diminishes the legal protections Congress and this Court have provided Indian land rights. As such, this case is one of the most important Indian land rights cases to come before this Court in a generation. The petition should be granted because the court of appeals' decision applying the doctrine of laches against the Cayuga Indian plaintiffs and the United States to bar their claims for money damages against the State of New York for its acquisition of Cayuga land in violation of the Trade and Intercourse Act conflicts with this Court's jurisprudence on laches.

This Court has uniformly held that laches requires more than the mere lapse of time; it requires both unreasonable delay, as evidenced by lack of diligence in asserting the claim, and prejudice to the defendant from such delay. *Costello v. United States*, 365 U.S. 265, 282 (1961); *Kansas v. Colorado*, 514 U.S. 673, 687 (1995). The court of appeals did not analyze the first element at all, and its analysis of the second element presumed such prejudice without considering the relevant circumstances. The court of appeals ruled that the Cayugas' claim was barred by laches as a matter of law simply because a long period of time had elapsed, which effectively converted laches into an ad hoc statute of limitations. The ruling below is contrary to this Court's long-established rule that laches requires a fact-specific determination.

The court of appeals committed two critical errors in focusing almost exclusively on the passage of time in its laches determination. In finding that it was inequitable to allow the Cayugas' claim to proceed, the court of appeals failed to take into account the State of New York's bad faith in its dealings with the Cayugas. Moreover, the court of appeals ignored the rule that delay cannot be unreasonable for purposes of laches when the party against whom it is invoked did not have adequate opportunity to bring suit earlier or was under a disability that prevented such suits. Because the court of appeals' errors are substantial, inconsistent with settled law as established by this Court, and implicate the United States' longstanding commitment to protect Indian land, this Court should review the decision below. If left undisturbed, the court of appeals' ruling would create a novel rule of laches applicable to claims brought by Indian tribes, in particular Indian land claims, and thereby inflict a grave injustice on the Cayugas and raise the specter of similar injustice for countless other litigants.

I. Review is Necessary Because the Court of Appeals Failed to Apply the Rule Established by This Court That Laches May Not Be Invoked By A Party That is Guilty of Bad Faith.

Recognizing that the doctrine of laches promotes basic fairness between the parties, this Court has uniformly held that the doctrine requires a searching factual inquiry into the circumstances of the parties' conduct, a task the court of appeals wholly failed to carry out. Without analysis of the Cayugas' particular circumstances or citation to the record, the court of appeals found that "the same considerations that doomed the Oneidas' claim in *City of*

Sherrill apply with equal force here." App. 21a.[3] This Court's decision in *Sherrill*,[4] however, does not support the application of laches to tribal claims under the Trade and Intercourse Act.

The defense of laches is an equitable doctrine and cannot be invoked by a party that comes to court with unclean hands. *See, e.g., ABF Freight System, Inc. v. Nat'l Labor Relations Bd.*, 510 U.S. 317, 329-330 (1994) (Justice Scalia concurring) ("The 'unclean hands' doctrine closes the door of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant."); *Pennecom B.V. v. Merrill Lynch Co., Inc.*, 372 F.3d 488, 493 (2d Cir. 2004). As the district court expressly found, the State of New York is guilty of bad faith in its long history of dealings with the Cayugas. App. 298a-300a. This bad faith and other factors discussed below precluded a finding of unreasonable delay by the Cayugas in filing the suit. Wholly disregarding the district court's factual findings, the court of appeals mistakenly concluded that laches barred the Cayugas' claims.

a. The State's Bad Faith With Regard to the 1795 Treaty

After reviewing the extensive historical record, the district court concluded that the facts "demonstrate[] all too vividly that the State did not act in good faith toward the Cayuga at the time of the 1795 and 1807 Treaties, but

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[3] Citations to pages in the Appendix ("App.") refer to the Appendix filed by Petitioner United States in 05-978.

[4] *City of Sherrill v. Oneida Indian Nation of New York*, 125 S.Ct. 1478 (2005).

also on subsequent occasions throughout the 200 years under consideration herein." App. 303a.[5] Following the American Revolution, the State of New York embarked on an aggressive policy to acquire the lands of the Six Nations Confederacy, of which the Cayuga Nation was a member, in knowing defiance of federal policy and law that centralized control over Indian land transactions in the federal government. *See generally*, Barbara Graymont, *New York State Indian Policy After the Revolution*, 57 NEW YORK HISTORY 438 (1976). Shortly after Congress enacted the second Trade and Intercourse Act in 1793, the State enacted a statute appointing agents for the purpose of inducing the Cayugas (and Oneidas and Onondagas) to quitclaim to the State for five dollars per square mile the lands the Indian nations had previously reserved. As Professor Graymont has noted, by this act "New York State intended to maintain complete control over Indian affairs and transfers of Indian real property within its borders, without recourse to the federal government." *Id.* at 461.

Shortly after the 1794 Treaty of Canandaigua was ratified guaranteeing the lands of the Six Nations, the State enacted a similar statute appointing agents for the purpose of acquiring Cayuga land, in open defiance of the requirements of the Trade and Intercourse Act and the Treaty. The 1795 act provided that the Cayugas would be paid fifty cents per acre and the land would subsequently be sold at public auction for not less than two dollars per acre, a disparity which the district court found to make the State's bad faith "virtually self-evident." App. 279a-280a. The State relied on this authority in negotiating the 1795

[5] Although the district court's bad faith inquiry was conducted as part of the court's determination of prejudgment interest, the facts found are equally relevant to the bad faith analysis under the doctrine of laches.

Treaty with the Cayugas, even though the State's Council of Revision had vetoed the act. The State Legislature overrode the Council's veto, ignoring the Council's findings that the 1795 act was completely unfair to the Cayugas and inconsistent with the State's obligations to them because three-quarters of the proceeds of any sale of Cayuga land would go to the State. App. 246a-247a. As the district court concluded, "the State cannot be said to have acted in good faith with respect to the Cayuga when it forged ahead with the 1795 act, putting its own financial gain above all else." App. 248a. The district court's conclusion that the 1795 act "was nothing more than a transparent attempt on the State's part to generate revenue at the expense, both economically and otherwise, of the Cayuga" is fully supported by the historical record. App. 286a-287a.

The circumstances surrounding the State's acquisition and subsequent sale of Cayuga land show a pattern of bad faith and duplicitous conduct. The State does not contest the fact that it obtained neither authorization nor approval from Congress for its acquisition of 64,000 acres of Cayuga land in the 1795 Treaty of Cayuga Ferry. New York Governor John Jay was aware of the Trade and Intercourse Act's requirements, having received a copy of a legal opinion from U.S. Attorney General William Bradford that unequivocally stated the necessity of the State's compliance with the terms of the Act. App. 259a. The State's lead negotiator, Phillip Schuyler, also knew of the Act's requirements before the 1795 Cayuga Treaty. In July, 1795, Israel Chapin, the federal Indian agent, questioned Schuyler about "how he construed the law of Congress in regard to holding treaties with the Indian tribes." In a letter to Secretary of War Timothy Pickering, Chapin reported that Schuyler "made very little reply by saying it